IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 2000 Session

IN RE: ESTATE OF PRATHER BUCHANAN HARPER

Appeal from the Probate Court for Davidson County
No. 99P-578 Frank G. Clement, Judge

No. M2000-00553-COA-R3-CV - Filed August 8, 2000

A testator's will left his property to specified individuals provided they survived him. The question we must decide is whether the antilapse statute, Tenn. Code Ann. § 32-3-105, saves those contingent interests for the beneficiaries' children when all the specified individuals predeceased the testator. The Probate Court of Davidson County held that it did not. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Probate Court Affirmed and Remanded

BEN H. CANTRELL, P.J., M.S., delivered the opinion of the court, in which WILLIAM C. KOCH, JR. and WILLIAM B. CAIN, JJ., joined.

James R. Tomkins, Nashville, Tennessee, for the appellant, Donnie Reed.

Jordan S. Keller, Nashville, Tennessee, for the appellees, Terry Wickham, Lloyd Ann Marston, Brenda Norton and Howard Ellis Norton.

OPINION

Prather Buchanan Harper died on February 11, 1999. His will left all of his estate to his wife if she survived him by more than thirty days and then went on to provide:

> However, if my wife does not survive me, renounces these bequests and devises or dissents from my will, I give, bequest and devise all of the foregoing in equal shares to my sister-in-law JANIE JAYE and to my sister, MARY LOU NORTON, if they both should survive me or to the survivor outright if only one should survive me.

The will had a residuary paragraph, but it simply repeated the disposition made in the prior section of the will.

On October 14, 1999, the administrator, c.t.a., petitioned the Probate Court of Davidson County for a construction of the will. The petition alleged that the testator's wife, his sister, Mary Lou Norton, and his sister-in-law, Janie Jaye, were all deceased at the time of the testator's death, and since the will did not have a provision covering that eventuality, the administrator sought the court's guidance on the distribution of the estate.

Mr. Harper's heirs and the heirs of his sister-in-law filed responses to the petition. Mr. Harper's heirs contended that the estate passed by intestate succession. Janie Jaye's heirs asserted that the bequest to her was preserved by the antilapse statute, Tenn. Code Ann. § 32-3-105. The probate court held that the antilapse statute did not apply and that the estate passed by intestate succession.

II.

The pertinent part of the antilapse statue is found in paragraph (a) of Tenn. Code Ann. § 32-3-105 (Supp. 1999):

> (a) Whenever the devisee or legatee or any member of a class to which an immediate devise or bequest is made, dies before the testator . . . leaving issue which survives the testator, the issue shall take the estate or interest devised or bequeathed which the devisee or legatee . . . would have taken, had that person survived the testator, unless a different disposition thereof is made or required by the will.

Although some early antilapse statutes, and the 1837 English Wills Act, were designed to prevent the lapse of devises and bequests to the children or other relatives of the testator, *see* 1 Vict. ch. 26 § 33; Mass. Rev. Stats ch. 62 § 24 (1836), the Tennessee antilapse statutes, since the first one appeared in 1842, have always applied to "any person" or "any devisee or legatee." In 1941, the legislature amended the statute to add class gifts to its provisions and the first sentence started like this: "Whenever the devisee or legatee to whom, or any member of a class to which, an immediate devise or bequest is made . . . ." *See* 1941 Tenn. Public Acts ch. 61 § 1. Thus, the word "immediate" appeared, and some wondered whether the statute now exempted future or contingent interests. When a law student pointed out this question in the 1987 law review article, the legislature took his advice and rewrote the first sentence in its present form. *See* David R. Foster, Note, *Testamentary Gifts of Future Interests: Is There an "Immediate" Problem with the Tennessee Antilapse Statute?"* 17 Mem. St. U. L. Rev. 263 (1987). As the statute now reads, the word "immediate" defines a class and not the type of devise included in the will.

The question remains, however, whether the antilapse statute has any effect on interests that are subject to the condition precedent of surviving the testator. The statute is one of several aids to help the courts determine the intent of the testator, *Weiss v. Broadway National Bank*, 322 S.W.2d 427 (Tenn. 1959), and it should be liberally construed. *Id.* The statute preserves devises or bequests for the "issue" of named beneficiaries. Tenn. Code Ann. § 32-3-105(a). If the beneficiary under the will dies before the testator and has no surviving issue the statute is inapplicable. *Dixon v. Cooper*,

12 S.W. 445 (Tenn. 1889); *Jones v. Hunt*, 34 S.W. 693 (1896); *Garner v. Home Bank & Trust Co.*, 107 S.W.2d 223 (Tenn. 1937). Therefore, the statute is a gap-filler that helps to carry out the testator's presumed intent; the presumption being that if the testator thought enough of the beneficiary to make an absolute gift to him/her, he would want the beneficiary's issue to take the property if the beneficiary predeceased the testator.

Another rule the courts rely on is a presumption that the testator does not intend to die intestate. *Ledbetter v. Ledbetter* 216 S.W.2d 718 (Tenn. 1949); *Brundige v. Alexander*, 547 S.W.2d 232 (Tenn. 1976). But when the testator's words are undeniably uncertain the legal rules of intestate succession must prevail. *Garner v. Home Bank & Trust Co.*, 107 S.W.2d 223 (Tenn. 1937). By its language the statute defers to the intention of the testator by making its operation subject to a "different disposition . . . made or required by the will." Tenn. Code Ann. § 32-3-105(a). In seeking to ascertain the testator's intent the court must determine it from what he has written in the will and not from what it is supposed he intended. *Burdick v. Gilpin*, 325 S.W.2d 547 (Tenn. 1959).

With that realization we would have to conclude that the antilapse statute does not affect Mr. Harper's will. The part left to the beneficiaries is not absolute, but is contingent on surviving Mr. Harper. The will clearly indicates an intent that the issue of the named beneficiaries would take nothing if the named beneficiaries did not survive Mr. Harper. Interpreting a statute with similar language to Tenn. Code Ann. § 32-3-105(a), the District of Columbia Circuit Court said:

> As an expedient to mitigate the rigors of common law doctrine, the antilapse statute is to be interpreted liberally with a view to attainment of its beneficent objective. To render the statute inoperative, a purpose inconsistent with that objective must fairly appear, and from the terms of the will itself. In final analysis, however, the statute furnishes but a rule of construction to pilot the decision where the will indicates little or nothing of the testator's desires on lapse. Where, on the other hand, the will reflects a countervailing intention with reasonable clarity, the statute does not save the gift from lapse.
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> Such an intention is manifested, and plainly so, where the will articulates the gift in words effectively conditioning its efficacy upon the beneficiary's survival of the testator. If, in such a situation, the beneficiary predeceases the testator, the statutory bar to lapse and the concomitant substitution of issue in the beneficiary's stead are at war with the testator's purpose that the gift shall take only in the event that the beneficiary outlives the benefactor. Not at all surprisingly, then, the cases teach that antilapse legislation has no application to gifts limited to vest upon the beneficiary's survival of the testator and not otherwise. It matters not, in this connection, whether the gift is to a single or to multiple beneficiaries, or whether there is or is not a limitation over to another upon the death of the primary beneficiary during the lifetime of the testator. (Footnotes omitted)

In re Estate of Florence V. Kerr, 433 F.2d 479, 483-84 (D.C. Cir. 1969).

A similar result was reached in *In re Wintermute*, 127 A. 218 (N.J. Eq. 1925). In that case the will left the residue of the testatrix' estate to her two sisters, but "in case at the time of my decease either one of my sisters as aforesaid should not be living then it is my will and I do hereby give the whole of my estate to the one surviving." When both sisters predeceased the testatrix, the court held that the antilapse statute had no application because "it is aimed at cases where the testamentary provision is not limited by the necessity of survivorship in order to take." 127 A. at 218. For cases to the same effect *see Central Nat'l Bank v. Stevenson*, 25 Del. Ch. 215, 16 A.2d 114, 116 (1940); *In re Barrett's Estate*, 159 Fla. 901, 33 So.2d 159, 161 (1948); *Powell v. Watkins*, 221 Ga. 851, 148 S.E.2d 303, 304-305 (1966); *In re Gerdes Estate*, 245 Iowa 778, 62 N.W.2d 777, 780 (1954); *Wallace v. Diehl*, 202 N.Y. 156, 95 N.E. 646, 650 (1911); *Day v. Brooks*, 10 Ohio Misc. 273, 224 N.E.2d 557, 566, 39 Ohio Op.2d 441 (1967); *Kunkel v. Kunkel*, 267 Pa. 163, 110 A. 73, 74 (1920); *In Re Stewart's Estate*, 270 Wis. 610, 72 N.W.2d 334, 336 (1955).

We acknowledge that the cases are not unanimous in holding that the antilapse statute does not apply to devises or bequests made contingent on surviving the testator. *See Galloupe v. Blake*, 248 Mass. 196, 142 N.E. 818 (1924). And we are aware of our own case of *Bybee v. Westrick*, 896 S.W.2d 792 (Tenn. Ct. App. 1994), but *Bybee* was decided on an altogether different point. In that case the court construed the will to resolve a patent ambiguity and found a clear intent on the part of the testator to leave her property jointly to her two children in case one of them predeceased her. Under the court's construction the will left the testatrix' property to her children jointly regardless of survivorship.

The judgment of the court below is affirmed and the cause is remanded to the Circuit Court of Davidson County for any further proceedings necessary. Tax the costs on appeal to the appellant, Donnie Reed.

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BEN H. CANTRELL, PRESIDING JUDGE, M.S.